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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WALSH SECURITIES, INC.,	:	Case No. 2:97-cv-3496-DRD-MAS
	:	
Plaintiff,	:	
	:	
vs.	:	
	:	Newark, New Jersey
CRISTO PROPERTY MANAGEMENT,	:	Friday, September 19, 2008
et al.,	:	2:53 p.m.
	:	
Defendants.	:	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE MICHAEL A. SHIPP
UNITED STATES MAGISTRATE JUDGE

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I N D E X

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Colloquy

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1 (Hearing commenced at 2:53 p.m.)

2 THE COURT: Okay. Good afternoon. We are on the
3 record in the matter of Walsh Securities versus Cristo
4 Properties, Docket Number 97-3496.

5 May I have appearances of counsel, please?

6 MR. MAGNANINI: Yes, Your Honor. Robert Magnanini
7 from Boies, Schiller and Flexner, for the plaintiff Walsh
8 Securities, Inc.

9 THE COURT: Good afternoon.

10 MR. KOTT: Hi, Judge. Nice to see you again. David
11 Kott, K-O-T-T, McCarter and English, LLP, for the defendant
12 Commonwealth Land Title Insurance Company.

13 THE COURT: Okay.

14 MR. HAYES: Good afternoon, Judge. Edward Hayes, Fox
15 Rothschild, for Fidelity National Title and Nations Title.

16 THE COURT: Good afternoon.

17 MR. MCGOWAN: Good afternoon, Your Honor. Martin
18 McGowan from Methfessel and Werbel on behalf of Coastal Title
19 Agency.

20 THE COURT: Good afternoon, counsel.

21 We are here today -- and let me just say this right
22 from the start. There are a lot of smaller issues that are at
23 issue here. I've read the papers and I'm really most concerned
24 about this whole relation back issue, so I don't want to
25 belabor a whole lot of additional oral argument, when that's

1 really my prime concern here. I think the papers are clear on
2 any and all other issues, but the issue that I have the most
3 concern about and I'd like for you to kind of focus in on is
4 really this whole relation back issue.

5 On June 27th, plaintiff filed a motion for leave to
6 file a fourth amended complaint. The motion has been
7 vigorously opposed. The Court is interested in oral argument
8 this afternoon and counsel should largely concentrate the
9 arguments on that issue.

10 Let me first hear from plaintiff's counsel and then
11 I'll hear from defense.

12 MR. MAGNANINI: Yes, Your Honor. Thank you.

13 Your Honor, may it please the Court, I'll focus in on
14 your area of concern, which is what we thought you'd be
15 interested in.

16 As you know, this case is a 1997 case, it was
17 originally filed back in July. It was active until April of
18 1998, so we had six months of activity, during which time the
19 plaintiffs had amended the complaint once and we added the
20 title companies after having made claims, the claims hadn't
21 been paid, so they were added to the case.

22 The case was then stayed between 1998 and 2004, when
23 Judge Bassler -- and despite a lot of efforts on our part to
24 get the government to make a decision on what they were doing
25 with the case, they wouldn't do that, and it actually took an

1 appearance in court that they had actually told me that morning
2 they wouldn't be agreeing to a lifting of the stay, but Judge
3 Bassler convinced them otherwise.

4 So, we got the case going again in 2004. We made the
5 -- we put in an amendment in January of 2005, which brought in
6 additional parties, did not include any new claims against any
7 of the current defendants. After about a year of motion
8 practice, that was resolved.

9 The case was stayed again for mediation, which took
10 about 19 months, and then Your Honor has activated it again
11 back in January of 2008.

12 So, pursuant to the case management order, as you
13 noted, we had filed this amendment adding six new counts
14 against the four remaining defendants, the three title
15 companies and their agent Coastal Title Agency. As Your Honor
16 saw in our papers, our basis for the amendment was a Rule
17 15(a), which says that leave shall be freely granted when
18 justice so requires.

19 And I could discuss the arguments about delay, if Your
20 Honor would like, but focusing on the relation back we looked
21 at Rule 15(c)(2), which states that claims asserted in an
22 amended pleading will relate back to the original date of
23 filing if the new allegations arise out of the same conduct
24 transaction or occurrence as alleged in the original pleadings.
25 The Supreme Court, I think, boiled it down well in the Mayle

1 versus Felix case, where they're looking at it, is it a common
2 core of operative facts.

3 And so, what we went back and did was we looked at the
4 complaint that we had and we looked at additional information
5 that had come out during the depositions which we got to take
6 during the mediation. The stay on discovery was lifted by
7 Magistrate Arleo and we were allowed to take nine depositions
8 of the perpetrators of the racketeering scheme. And during
9 that time, we got information from Mr. Kane and Mr. Grieser,
10 the two guys at the heart of the scheme, about different
11 things, and so some of that is the information we added into
12 the complaint.

13 And what we also did was we clarified our legal
14 theories. What we've tried to do, basically, Your Honor, is
15 take this racketeering scheme with 28 defendants and narrow
16 down what's left, which are basically contract and we believe
17 fraud claims and either -- and negligence claims against
18 Coastal Title Agency and its principals, Commonwealth, Nations
19 and Fidelity Title Insurance Companies. And it's all of the
20 new facts or new legal theories all relate to this common core
21 of operative facts, which is the racketeering scheme that
22 defrauded Walsh Securities out of \$25 million dollars.

23 And as part of -- as a necessary part of the
24 racketeering scheme, in order for Walsh to wire money to any
25 closing lawyer or anywhere, it needed two things: initial --

1 well, besides the buyer and all that -- it needed a title
2 insurance policy or a binder to be issued, and it needed a
3 closing service protection letter, which was also issued by the
4 title companies through Coastal. And what those things
5 provided the mortgage bank with was assurances that, if it
6 wired the money, that its closing instructions would be filed.
7 It was actually going to get a purchaser who was able -- a bona
8 fide purchaser, if you will, who can make payments and that its
9 position, its mortgage would be recorded properly.

10 And, in fact, what we've alleged, both in our prior
11 complaints and with these amendments, is that didn't occur,
12 that Walsh's closing instructions weren't followed, that the
13 documents, the mortgages and notes were not recorded properly.
14 As a matter of fact, in going through some of the documents
15 we've come upon, we've got Cristo Properties, which bought the
16 property for, say \$10,000, from an estate and then sold it to
17 one of the straw buyers. We actually have the sale from Cristo
18 to the straw buyer, which is financed by Walsh, being recorded
19 first before Cristo was actually bought the property from the
20 buyer.

21 So, these were actions and events that the Coastal
22 Title participated in. Actually, on April 8th of 1997, they
23 must have had a wheelbarrow full of closing documents they took
24 down and filed. And, again, Coastal is the agent of the title
25 companies; because, without the closing service protection

1 letters, without the binders, Walsh was never going to wire
2 money to close these loans.

3 And, so, what we viewed this as, Your Honor, was that
4 the original pleading involves an agreement between the
5 parties. When we're saying agreement or a contract between
6 Walsh and the title companies or an agreement between Walsh and
7 Coastal. And the claims arising out of, quote, the entry into
8 that agreement or revolving around the consummation of that
9 agreement would be considered to have arisen from the same
10 conduct under Rule 15(c). And that case is the Lind versus
11 Vanguard Offset Printers, 857 F.Supp. 1060.

12 And Commonwealth actually, in their papers on page 20,
13 admits that the transaction at issue, as they state, is the
14 consummation of this agreement between Commonwealth to provide
15 title insurance and Walsh Securities to loan money. Now,
16 Commonwealth -- the premiums to the title companies were paid
17 by the buyers, but as we've discovered that was actually paid
18 by money that Walsh Securities had wired. But, again, without
19 the issuance of the policy or the binder and the closing
20 service protection letter, there never would have been a
21 closing and a wiring of the money from Walsh Securities.

22 So, all of the facts that we've alleged in our amended
23 complaint and these legal theories relate back to that -- this
24 RICO scheme or fraud in which a property was acquired, was
25 inflated by the appraisers, was sold to a straw buyer and the

1 closing agents, the lawyers actually sent in a letter saying
2 we've got 25 percent of the money in escrow or there was a
3 second mortgage and, then, based on those criteria, Walsh
4 issued a mortgage. And, again, without the title insurance
5 policy or binder or the closing service protection letter,
6 Walsh would have never issued the money. So, all of the facts
7 that we've included in the complaint and the new legal theories
8 are all tied to that same issue.

9 We haven't gone back and said, you know, in 1995 a
10 vehicle owned by the title companies was driving down the road
11 and ran over Mr. Walsh, and we've added that in. If you go
12 through the amended complaint, all of our additions relate to
13 the scheme to acquire properties, have them inflated in value
14 and sell them off to Walsh Securities. And a necessary part of
15 that was the provision of title insurance and the closing
16 service protection letters.

17 As you see, some of our other claims relate to events
18 that happened subsequently to us originally naming the title
19 companies, and those events were: Walsh had put the title
20 companies on notice that it had been defrauded and it had
21 insufficient capital to foreclose on, also an inability to
22 foreclose on because of the way the documents were recorded,
23 and the title companies had failed to cover Walsh for its
24 losses.

25 So, the legal theories we've asked for in addition

1 have be -- have been to ask that the Court declare that the
2 title insurance companies should provide coverage on these
3 policies. Again, the policies, all that information, all those
4 -- all the facts of those claims relate back to the original
5 amendment in 1998 and have been in the case the entire time.

6 One of the things -- one of the cases the defendants
7 pointed out was the Unicare case, which actually says that the
8 focus isn't really on a connection between the claims that are
9 required, but a connection between the facts forming the basis
10 of those claims. And, again, all the facts we've added have
11 been things that have come out of either documents or these
12 depositions from the mediation and that's what we've put in the
13 fourth amended complaint.

14 And, then, all of the legal theories that we've added
15 are, again, either based on facts that were in the amended
16 complaint or on these new facts. And if you go back to the
17 Blatt versus Merrill Lynch case in the District of New Jersey,
18 916 F.Supp. 1343, it says the assertion of new legal theories
19 based on facts previously alleged or reasonably inferred from
20 facts previously alleged is permissible.

21 And I think the touchstone for this relation back is
22 whether there's any prejudice to the defendants, whether the
23 case has proceeded along, they've taken discovery, they've put
24 in expert testimony and things like that and now they're -- now
25 the playing field has shifted on them. In this case, because

1 of these delays in what we've had, both sides have put out
2 document requests, we've put documents into a central
3 repository, but we haven't taken any depositions for use in
4 this case. So, there hasn't been any discovery that's occurred
5 that the -- or anything that's happened that the defendants
6 could point to that somehow they've been prejudiced by the
7 relation back.

8 And then, if you go through -- excuse me. I guess I
9 don't need to go into -- Fidelity had also raised a futility
10 defenses.

11 THE COURT: No, you --

12 MR. MAGNANINI: But you don't need that. But I've --
13 we've looked at all the cases, Your Honor, and as I said, I
14 think this case is much more akin to the Kovats versus Rutgers
15 case, which is an old D.N.J. case from '86. But in that case,
16 the plaintiffs were allowed to amend four years after the case
17 had been filed and after an administrative termination similar
18 to Walsh Securities. And the judge held that:

19 "Since the issues raised by the amendments have been
20 the subject of ongoing discovery" -- and these issues will
21 be the subject of discovery when it -- when we get it going
22 again -- "I fail to see how either party will be prejudiced
23 by these amendments. Any alleged delay, absent a showing
24 of bad faith, does not warrant denial of leave to amend."

25 And that was Judge Debevoise.

1 So, all of -- I guess, in a nutshell, all of the facts
2 that we've added came from when we finally got to depose a
3 couple of people intimately involved with the RICO scheme; and,
4 then, all of the legal theories are based on those facts or the
5 facts that were already in here. And so, therefore, we believe
6 this clearly relates back. As I said, we haven't tried to
7 expand the scope of this, it's -- everything is tied to money
8 was paid for premiums, policies, binders, closing service
9 protection letters were issued and they haven't been paid on it
10 and that's where we are.

11 THE COURT: Okay. Thank you, Mr. Magnanini.

12 Mr. Kott?

13 MR. KOTT: Yeah, thank you, Judge.

14 The federal rule, the terms of the federal rule don't
15 help us much on this analysis, because we need to look at some
16 of the case law to find the interpretation of the federal rule.
17 And in particular, Judge Greenaway's decision in the Farrell
18 case, he refers to type and time, and we look at time and type
19 to determine whether something like this amendment would relate
20 back.

21 And let me address first time. The claims in the
22 original complaint against the title companies dealt with what
23 the title companies did after the loss occurred; that is, after
24 the loss occurred and a claim was presented, did the title
25 companies honor the claim. The proposed amendment by the

1 plaintiff, the proposed fourth amendment -- amended complaint,
2 the time frame addressed is before the policies were ever
3 issued, before the loss was ever issued. Because in the
4 proposed fourth amended complaint, what the plaintiff is
5 alleging is facts relating to the conduct of the title
6 companies that would have occurred well in advance of what --
7 when the loss occurred.

8 Turning to Greenaway's second aspect, type -- and I'm
9 going to use words active and passive. I'm not using them in
10 the states -- you know, in the technical terms. But in the
11 original complaint or in the second and third, what is alleged
12 against us, the title companies, is essentially kind of what I
13 would call a passive kind of conduct; you didn't honor a claim
14 that you should have honored. In the proposed fourth amended
15 complaint, it is much more active kind of conduct; meaning, you
16 were an active tortfeasor here, you were engaged in the
17 conduct, you were part of the fraud.

18 So, when we look at time and type, to put the meat on
19 the Federal Rule of Civil Procedure 15, we find -- accepting
20 Judge Greenaway's analysis, which is a, I think, a fairly well-
21 established analysis -- that, in fact, this does not relate
22 back.

23 Plaintiffs say, Mr. Magnanini just said, well, you
24 know, we had sued all these other parties and alleged all these
25 bad things against these other parties and, therefore, you, the

1 title companies, it ought to relate back. Except for we have
2 Unicure and we have some other decisions, cited more in
3 Fidelity's brief than in mine, that says we don't get relation
4 back, because you said in your original complaint Bill was a
5 wrongdoer and now you want to amend to add David as a
6 wrongdoer. We don't do that. The relation back, the fact that
7 there is allegations against some other party does not relate
8 back when you try to take those allegations and now move them
9 to the other party.

10 I'm nearing the end. I want to answer any questions,
11 but I just want to make two points.

12 I think when you look at the relation back
13 jurisprudence, what you're really looking at, one of the things
14 was were these defendants aware from reading the complaint,
15 could they have been aware that, really, the complaint was
16 talking about them. And when you look at the third amended
17 complaint, which was the last one that was filed, there is no
18 way, because of time and type, the title insurance defendants
19 could have known, oh, when he was doing these other
20 allegations, this complex fraudulence scheme, that he was
21 saying that we were the participants in that scheme.

22 And, finally, there was some discussion of prejudice
23 just now by Mr. Magnanini. I believe and I believe with a fair
24 amount of confidence, that on the relation back prejudice is
25 not a factor. That may be a factor on whether we're -- whether

1 the plaintiff is granted leave to amend the complaint when you
2 look at the case law, but I don't believe that prejudice is a
3 factor on relation back. Because after all, Judge, relation
4 back, what we're really talking about is the statute of
5 limitations.

6 And let me give you an easy example. Two-year statute
7 of limitations for personal injury. Plaintiff's in an
8 automobile accident, he sues two years and two months later and
9 there's no prejudice. Well, the fact that there's no prejudice
10 by the late lawsuit is not a defense, because it's a statute of
11 limitations. On statute of limitations, we don't look at
12 prejudice, we look at whether or not the statute was met or not
13 met.

14 So, I think, for these reasons on this record, there
15 ought not to be relation back.

16 And let me just add one thing on prejudice, if the
17 Court thinks I am wrong on my analysis. I don't think it is
18 correct for Mr. Magnanini to say, in these circumstances, an
19 11-year-old lawsuit, we have to show prejudice, because how do
20 we, after 11 years -- as I stand here today, I can't tell you
21 what witnesses are gone, I can't tell you what documents are
22 gone, what recollection is faded, and all the other indicia of
23 prejudice that might be shown. I might be able to do that in
24 nine months, if you allow the amendment; but, in nine months,
25 if I come back and say I'm prejudiced, you might not allow me

1 to do it.

2 I would submit, an 11-year-old lawsuit -- and if you
3 take all the stays out, the stays are almost six years -- so,
4 we have a five-year lawsuit that was amended three times, the
5 most recent amendment is in 2005, that the burden ought not to
6 be on the defendants to show prejudice, the burden ought to be
7 on the plaintiff to show the absence of prejudice to the
8 defendants; meaning, all the witnesses are available, they all
9 have recollection, the documents are all there and the other
10 indicia.

11 If the Court has any questions, I --

12 THE COURT: Thank you, Mr. Kott.

13 And Mr. Hayes, it is, correct?

14 MR. HAYES: Yes, that's correct, Your Honor. Good
15 afternoon.

16 THE COURT: And I'm sure we're not going to be
17 redundant of the issues already raised by Mr. Kott, correct?

18 MR. HAYES: Not at all, Judge.

19 THE COURT: Thank you.

20 MR. HAYES: And, in fact, I have a complete different
21 issue to deal with, --

22 THE COURT: That's right.

23 MR. HAYES: -- because one of the sought amendments --

24 THE COURT: Fidelity.

25 MR. HAYES: -- against only Fidelity --

1 THE COURT: Okay.

2 MR. HAYES: -- is this memo that was issued in August
3 of 1997, after the Asbury Park Press had broke the story about
4 the fraud and the artificially-inflated values and the problems
5 in this particular transaction. And as Your Honor has seen,
6 while Mr. Magnanini didn't attach it, we attached to our
7 response the memo in question, as well as, we think more
8 importantly, the response to that memo nine days later from
9 Walsh saying that we believe your memo is inappropriate and
10 improper and we will bring claims against you as a result of
11 it, in August of 1997.

12 Now, the issue, as David mentioned, is clearly a
13 statute of limitations issue. If Your Honor were to entertain
14 a tortious interference claim, which is what they seek to amend
15 with respect to Fidelity only, there's a six-year statute. The
16 memo was issue in 1997. They have no argument that they were
17 unaware of its existence until recently. They have no argument
18 that it was merely discovered or recently discovered as part of
19 this discovery in the mediation. They wrote in response to it
20 nine days after the memo was issued.

21 It is a question of whether Your Honor will allow
22 relation back to, in essence, destroy our statute of
23 limitations defense, which creates a futility situation for
24 purpose of amendment. And I would argue to you, Judge, that on
25 that claim they cannot in good conscience make an argument that

1 it relates back to the facts that were a part of the underlying
2 case. The case, as originally filed and as amended, was that
3 the, quote/unquote, RICO defendant engaged in a mass fraud by
4 which Walsh lost millions and millions of dollars, all of which
5 occurred prior to the Asbury Park breaking the story.

6 As to Mr. Kott's client and my client, we were not
7 alleged to be a participant in the fraud in any aspect
8 whatsoever. The claim of the multi-count complaint against Mr.
9 Kott's client and mine was simple: you issued a closing
10 protection letter to us, the closing protection letter were --
11 they were issued at each closing and they constituted a
12 contract between your company and Walsh to protect against the
13 fraud that we've complained of in this case. Not you're a
14 participant, but you had a contractual obligation under the
15 closing protection letter to protect us against the fraud.

16 Now, interestingly, although we hear all these
17 arguments about the title policies, the companies also issued
18 title policies at each of those closings. Those title policies
19 were not the subject of the first complaint and the second
20 complaint and the third complaint or the fourth complaint, the
21 complaint was limited to Mr. Kott's client and my client didn't
22 do what they were contractually obligated to do under the
23 closing protection letters.

24 Now, we look at this new claim. This new claim says,
25 after you didn't do what you should have done under the closing

1 protection letters, you got angry with the fact that we brought
2 a claim and you issued a memo to your agents after the fraud
3 was complete, after we had submitted claims to you saying that,
4 before any subsequent policies are issued in which Walsh is a
5 lender, approval from Fidelity must be obtained, and that that
6 somehow tortiously interfered with Walsh's business.

7 Well, Judge, there's no clearer example in my mind of
8 that being a separate unrelated set of circumstances. To use
9 Mr. Kott's phrases of time, you know, it was not at the same
10 time, it did not involve the same transaction, it did not
11 involve the same facts, it was a completely unrelated claim
12 that's now being raised 11 years after it happened when the
13 client, Walsh, knew about it, threatened to bring the claim in
14 the August 21, 1997 memo, and now decides to bring it for the
15 first time in 2008. Judge, I -- to me, there can be no
16 relation back on that claim.

17 With respect to the relation back, I think Mr. Kott
18 hit all of the points I wanted. I agree with him, prejudice is
19 not an issue. Your Honor has to make two decisions here.
20 First, do I permit an amendment, in general. And Your Honor
21 can look at prejudice on that end of it, but in dealing with
22 our futility argument, which is primarily one of the statute of
23 limitations. Mr. Magnanini only gets it around if he can get
24 where the relation back doctrine applied. And prejudice is not
25 in any of the cases that I saw with relation back, and we have

1 cited a few cases in our brief in the latter portion that talk
2 exactly as Mr. Kott said, you don't get the protection by
3 claiming we said someone else did something wrong. When you
4 had the opportunity in your initial filing, when you had the
5 opportunity in all of your amendments to say that we did
6 something wrong, but didn't do it, you don't get the protection
7 of relation back.

8 The only other thing I would mention, Judge, that the
9 inference that is trying to be created here is that something
10 happened in these depositions during the mediation that caused
11 Walsh to recognize that it had this claim against us. With all
12 due respect, Judge, those depositions were taken for a specific
13 purpose and that was to provide us with an opportunity to
14 determine if there was evidence that the principals of Walsh
15 participated in the fraud. That was the purpose for those
16 depositions. They were not open-end depositions, the stay was
17 lifted for a very limited purpose. And to argue that something
18 was discovered in those depositions is just disingenuous,
19 nothing was discovered at all.

20 Every single fact that's in the current proposed
21 amended complaint was in Walsh's possession when they filed the
22 first complaint, when they filed the second complaint, when
23 they filed the third complaint and when they filed the fourth
24 complaint. And as I said in my submission, Judge, there has to
25 come a time when a defendant can feel comfortable that, while

1 claims may have existed, that they can no longer be brought.
2 That's the whole purpose of the statute of limitations. I
3 would suggest to you that, after 11 years, I think my client
4 had the right to assume it would not be sued for a memo that
5 was issued in August of 1997 and it would not be alleged as an
6 active participant in a fraud, when it was never alleged to
7 have been one before.

8 So, as far as we're concerned, Judge, there can be no
9 relation back here, both amendments against my client would be
10 barred by the statute and, therefore, would be barred by the
11 statute and we would respectfully request that Your Honor not
12 permit the amendment. Thank you, sir.

13 THE COURT: Thank you.

14 Mr. McGowan?

15 MR. MCGOWAN: Thank you, Your Honor.

16 One of the benefits of going last, Your Honor, is a
17 lot of it's already been said.

18 THE COURT: Yeah. One second, let me just make sure
19 my notes are clear here.

20 (Extended pause)

21 THE COURT: Okay, Mr. McGowan, please proceed.

22 MR. MCGOWAN: Thank you, Your Honor.

23 THE COURT: Thank you.

24 MR. MCGOWAN: I think Mr. Kott put his finger on it
25 early on in his presentation when he said the relation back

1 doctrine, what we're really talking about is a statute of
2 limitations. For ten years, my client has been identified as a
3 RICO defendant. In other words, for ten years, my client has
4 fallen on the intentional side of things, as opposed to the
5 negligent side of things.

6 And the intentional side of things and the negligent
7 side of things, it seems to me, are the grand dichotomy of
8 American jurisprudence. It was alleged for ten years, through
9 four versions of this complaint, that I was in cahoots with the
10 appraisers, that I was in cahoots with the phony buyers, that I
11 was in cahoots with the crooked attorneys, that I was in
12 cahoots with Mr. Kane and his business organization. It is no
13 longer going to be alleged that. So, for ten years, this case
14 has been defended by my -- not only by myself, but by my
15 client's personal counsel, pursuant to a reservation of rights
16 agreement, on that basis.

17 I take it from Your Honor's interest in hearing from
18 us regarding the statute of limitations slash relation back
19 issue, that Your Honor is interested in the fact that these
20 claims aren't just restating or parsing or more particularizing
21 claims that have already been in this case, these are new
22 claims. And if Your Honor wasn't thinking they were new
23 claims, then this statute of limitations issue, the relation
24 back issue would be of less interest to you, I think.

25 It is now no longer going to be alleged that I was in

1 cahoots with anyone, it is now going to be alleged that I was
2 independently negligent. Well, we've had various explanations
3 here for the existence of statutes of limitations. One of them
4 is to curtail litigation. It is not in the public policy of
5 this state, in the federal court or the state court or any
6 other place, to foster litigation after a certain period of
7 time, that's why statutes of limitations exist.

8 In this case, you know, whether you use a two-year
9 statute, a six-year statute, a seven, eight, nine, you can use
10 any statute that you could divine, it is ten years since the
11 original filing, it is more than that since the actions that
12 are alleged to have harmed the plaintiff have taken place, and
13 there have been four complaints, none of which have alleged
14 negligence as to my client. The statute has run. This is a
15 new claim, it's an entirely different defense, it's an entirely
16 -- it has entirely different remedies, it has entirely
17 different ramifications, it's a new ball game and it's a ball
18 game that I would suggest has been barred by the statute of
19 limitations for any number of years.

20 That's what I have to say, Judge.

21 THE COURT: Okay. Thank you.

22 Mr. Magnanini?

23 MR. MAGNANINI: Yes, Your Honor. Let me see if I can
24 put this together quick for you.

25 THE COURT: I'm interested in hearing what you have to

1 say about prejudice and --

2 MR. MAGNANINI: Roger that, Your Honor.

3 Actually -- and that's what -- I knew I wasn't
4 completely off the mark, but if you -- and we've actually cited
5 the case -- I'm not going to read them all to you -- but on
6 page 9 of our reply brief there it says -- if you go back to
7 Evans Products versus West American Insurance Company, the
8 Third Circuit says the primary policy underlying the Rule 15(c)
9 in a relation back is avoiding prejudice to defendant and it
10 says:

11 "To avoid prejudice to defendant, it's necessary,
12 quote, 'that the defendant be able to anticipate claims
13 that might follow from the facts alleged by the plaintiff,'
14 close quote" -- that's, sorry, out of a Ninth Circuit case,
15 and then -- "notice to the defendant of the facts that
16 caused the injury alleged in the amended pleading is,
17 therefore, paramount. When such notice has been provided,
18 an amendment should be permitted, quote, 'to facilitate the
19 fair trial of the existing issues between plaintiff and
20 defendants.'"

21 And then, if you go back to a Third Circuit case we
22 cited from 2004, Bensel versus Allied Pilots Association, the
23 court said that, if defendants had fair notice of the general
24 fact situation of which -- upon which the amending party
25 proceeds then relation back is proper. So, prejudice is a

1 touchstone.

2 And one of the other points I would just like to clear
3 up, Your Honor, is the six causes of action that we're
4 alleging, we've alleged common law fraud against Coastal Title
5 and that's primarily coming out of -- just so you think I'm not
6 disingenuous -- from a deposition of Mr. Kane who, for the
7 first time during the mediation we got to depose him. Since,
8 of course, he was an adversary, he went to -- pled guilty, went
9 to jail. And he testified that he was actually at a meeting
10 with his lawyer with Mr. Pepsny and Mr. McGowan's principal,
11 Robert Agel, in which Mr. Agel told him, quote, how to do
12 things right to keep these deals going.

13 So, our focus on adding common law -- now, Mr. McGowan
14 will disagree with my I guess how I phrase that -- but our
15 common law fraud claims stem from that. The common law fraud
16 claims against Commonwealth, Fidelity and Nations are vicarious
17 liability claims, because of the acts of their agent. We
18 haven't thrown them into these RICO claims or anything else,
19 nor, as Mr. McGowan suggested, have we divorced him completely
20 from any intentional wrongdoing.

21 They were on notice of intentional wrongdoing and, as
22 a matter of fact, their defense throughout this has been we
23 didn't do it, we didn't participate, we didn't do anything
24 wrong. But, again, going through documents that we've got,
25 they weren't filing things properly. So, if they weren't doing

1 this intentionally, they sure weren't doing it properly and
2 that's why we had the negligence claims in there.

3 And, then, the other claims we have against the title
4 companies -- wrongful delay, and denial of insurance claims,
5 and coverage and a declaration asking for coverage so we can
6 get paid -- all, again, relate back to these initial claims
7 that we've had. And, then -- I think that Mr. Kott's point.

8 Mr. Hayes had a separate point, Your Honor, on the
9 August 1997. And, again, that -- what he -- what he'd like to
10 do is really have you parse and draw a line between the cause
11 and the effect. That he's quoted a couple of cases which
12 really aren't on point, in which the memo or the documents were
13 miscited or that sort of thing. What we've alleged in the
14 complaint was, after this fraud and directly as a result of
15 this fraud, Mr. Hayes's client I think will admit they issued
16 this memo saying, we will not issue policies to any loan
17 underwritten by Walsh Securities unless we've had time to
18 review it and issue a written approval.

19 And what we've alleged, that in a fluid, quick
20 mortgage situation where you go to several bankers with one
21 loan shopping for the best rate for the lowest points for the
22 client and the most money for the broker, any broker that had
23 to submit it to Walsh Securities get underwriting approval so
24 they know Walsh would underwrite the loan, then turn around and
25 send that packet to Fidelity to have them review the

1 underwriting and then issue a written decision before they knew
2 that Fidelity would issue title insurance or a closing service
3 protection letter in order for Walsh, the mortgage bank, to
4 wire money. That just wasn't going to happen.

5 So, again, what we're alleging is that, as a result of
6 this fraud, Fidelity did what it did, it issued this memo and
7 then -- and as a result of that -- now, it's not specifically
8 worded in the memo -- but as a result of the memo, people
9 steered business away from Walsh Securities. And, again, the
10 effect of all of these facts that we've alleged in all of these
11 claims is all the same things. Business was steered way from
12 Walsh, Walsh couldn't get funding, the deal to sell Walsh
13 Securities collapsed and Walsh's word is now, because of all
14 these events, it's not worth anything other than this lawsuit.

15 And that's where -- how we see all these things
16 related to the same set of underlying facts and circumstances
17 and, so, I think that, in a nutshell, Your Honor, hits the
18 major points you've heard.

19 MR. KOTT: Judge, I --

20 THE COURT: Yes.

21 MR. KOTT: -- don't normally ask, but may I have 30
22 seconds just on one narrow thing?

23 THE COURT: Sure, wrap it up, please.

24 MR. KOTT: I just want to address, because Mr.

25 Magnanini addressed Evans Products, a Third Circuit case on the

1 issue of prejudice.

2 THE COURT: One second. Okay, go ahead.

3 MR. KOTT: And I had used earlier the word notice. If
4 something relates back, it relates back in part because the
5 defendant, from reading the original complaint, was on notice
6 that there were claims being asserted against him for that.
7 And, in that situation, there is no prejudice and that's really
8 what Evans Products is saying. Evans Products -- when we --
9 when Evans Products uses the word prejudice, they are not using
10 it or the court is not using it in the way that it is being
11 used on -- should plaintiff be granted leave to amend; meaning,
12 did the defendant lose evidence and things like that.

13 If the Court finds that there's -- this is proper
14 relation back, you rule in favor of the plaintiff, then what
15 Evans Products says is, there's no prejudice to these
16 defendants, because they could have, from reading the original
17 complaint and the facts pled, known that the reference was to
18 them under time and type. It is a different use of the word
19 prejudice. On the other hand, if the Court does not find that
20 it meets the criteria for relation back, the Farrell case,
21 Judge Greenaway, then you don't get to the prejudice type of
22 question the way you do on leave to appeal; meaning, was
23 evidence lost and things of those -- that -- I'm sorry, leave
24 to amend. Then you don't get to that issue.

25 And so, really, what I'm saying is, when you read

1 Evans Products and Evans Products talks about prejudice, all
2 Evans Products is saying is, if it relates back, there is
3 conclusive no prejudice to the defendant, because the defendant
4 would have known from the original complaint that there were
5 claims asserted against it.

6 THE COURT: Okay. Thank you. Okay, counsel. I thank
7 you very much for your oral arguments, it's been helpful. The
8 Court right now is planning on issuing a written opinion on
9 this within the next week or so, so this matter should be
10 resolved in short order. Okay? Thank you very much.

11 MR. MAGNANINI: Thank you, Judge.

12 MR. KOTT: Thank you, Your Honor.

13 THE CLERK: All rise.

14 (Hearing adjourned at 3:32 p.m.)

15 C E R T I F I C A T I O N

16 I, TERRY L. DeMARCO, court-approved transcriber,
17 certify that the foregoing is a correct transcript from the
18 electronic sound recording of the proceedings in the above-
19 entitled matter.

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23 Date

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